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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	

REPLY COMMENTS OF THE

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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INTV hereby submits the following Reply Comments in the above captioned proceeding. It is not INTV's intention to comment on all issues relating to rate regulation. Specific issues have been raised in this proceeding which will have a impact on Independent television stations.

I. BASIC TIER COMPOSITION.

A. Basic Buy Through Requirement

The Commissions Notice requested comment on whether Section 623(b)(7) of the Act would permit subscribers to purchase services *a la carte* without first purchasing the basic tier. If anything, this approach offers a unique and strained interpretation of

statute that is fundamentally incorrect.[1] Section 623(b)7(A) reads in relevant part:

> Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service.

The Commission's Notice attempts to twist this language. The argument is predicated on a belief that *a la carte* services are not considered a "tier" of service. Accordingly, it is argued that there is no requirement to purchase the basic service tier before gaining access to *a la carte* services.

Both statutory language and the legislative history make it clear that the basic service tier must be purchased in order to access any other programming services including *a la carte* offerings.[2] This becomes evident from a plain reading of the "buy through" provision of Section 623 (b)(8)(A) with reads:

> A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. (emphasis supplied)

Construing Section 623(b)(7)(A) to mean that a cable operator could offer *a la carte* services without requiring the purchase of the basic tier is inconsistent with the above stated language. In

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[1] See Comments of NAB at 7-8.

[2] The Commission solicited comment on whether the basic service tier must be purchased in order to purchase a "separate offering of a non-video or 'institutional network.' " A noted above, the basic tier must be provided to all cable subscribers. Accordingly, INTV believes such non-video offerings should be considered a "tier" of service. Purchasing the basic video service should be a precondition to accessing such offerings.

effect the FCC would be striking the phrase "other than the basic service tier" out of 623(b)(8)(A). If purchase of the basic tier was not mandatory, there would be no need to include such qualifying language in the provision. The Commission's approach is inconsistent with basic statutory construction.

The only way the FCC's interpretation makes sense is to construe Section 623(b)(8)(A) and 623(b)7(A) as permissive. In other words, cable operators may not require purchase of non basic tiers of service, but have the discretion to require purchase of the basic tier as a condition to purchasing *a la carte* services. However, such an interpretation contradicts the requirement of Section 623(b)(7)(A) which states that cable operators "shall provide" a basic tier of service. The provision does not state that cable operators have the discretion merely to "offer" a basic service tier.

The Commission's construction makes provision of a basic service tier optional. Any cable operator could avoid providing a basic tier as long as all other services are sold *a la carte*. Such a construction undermines the entire statute. It directly conflicts with the must-carry requirements of 614(b)(7) and 615(h) which require that must-carry signals "be provided to every subscriber of a cable system." The key word is "provided." The legislation does not state that the basic must-carry tier becomes an option on cable systems which have shifted to *a la carte* offerings.

The Commission's interpretation also conflicts with Congressional concerns that cable operators may evade the statute through the "retiering process." Section 623(h) requires the Commission to establish standards and procedures to prevent evasions, including evasions that result from retiering. The Conference Report states:

> The conferees recognize that many cable operators have shifted cable programs out of the basic service tier into other packages and that this practice can cause subscribers' rates for cable service to increase. The conferees are concerned that such retiering may result in the evasion of the Commission's regulations to enforce the bill.[3]

This is precisely what will happen if the Commission's interpretation is accepted. Cable operators will be relieved of the obligation to provide a rate regulated basic service tier as long as other programming is sold on an *a la carte* basis. The basic service tier will become nothing more than an option. This is the ultimate evasion.[4]

The legislative history supports the concept that subscribers must purchase the basic tier in order to purchase *a la carte* programming services.[5] The "buy through" requirement first

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[3]House Conference Report No. 102-862, 102nd Cong. 2d Sess., September 1992 at 65 (Conference Report).

[4]Even TCI appreciates the problem stating that "this construction means that a cable operator can determine how a particular channel is regulated by how it offers its availability. TCI Comments at 26.

[5]Language in the Conference Report at 60, describing the effect of the House "buy through" requirement, is clear.

> This subsection prohibits cable operators from requiring the subscription to any tier other than the basic tier

appeared in H.R. 4850. When discussing the definition of "cable programming services" the House Report confirmed that purchasing the basic tier is a precondition to purchasing *a la carte* offerings.

> Subsection (1)(2) defines "cable programming service" as any video programming provided over a cable system, regardless of service tier. Excluded from the term "cable programming service" is video programming required to be carried under subsection (b)(2) and programming offered on a stand-alone, per channel basis (such as HBO and Showtime and some regional sports channels) Per channel offerings available to subscribers upon purchase of the basic tier can enhance subscriber choice and encourage competition among programming services.[6]

The fatal flaw in the Commission's analysis is the idea that the term "tier of service" in Section 623(b)(7)(A) refers only to cable program services that are bundled and sold as a package. However, there is nothing in the legislation or the legislative history to indicate this was the intent of the provision. Indeed, programs sold on an *a la carte* basis, either collectively or individually, may properly be classified as a "tier" of service. The House Report alludes to a more general classification of tiering when discussing the intent of the rate regulation provisions.

> Under this section, the only cable services potentially not subject to the Commission's regulatory authority

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> as a condition of access to any programming offered on a per channel or per program basis....

The Conference Committee generally accepted the House provision, revising only the time table for its implementation. Conference Report at 64.

[6]House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102nd Cong. 2d Sess. 1992 at 89-90. (House Report)

> would be services traditionally offered on a stand-alone, per channel basis (premium channels like HBO and Showtime) or other programming that cable operators choose to offer on a per-programming service, per-channel or pay-per-view basis. However with regard to these latter programming services, section 3 directs the FCC to scrutinize and prevent repricing, retiring, or other alterations of rate structure that could have the effect of evading the purposes of this section.[7]

To the extent *a la carte* services were discussed in the context of "retiering" it is reasonable to assume that the phrase "any other tier of service" in Section 623(b)(7)(A) is not limited to traditional cable program services that are bundled and sold in a block. Bundling programs is not synonymous with concept of tiering. *A la carte* pricing and service tier are not mutually exclusive concepts.

B. Retransmission Consent Stations on the Basic Tier

The Notice requests comment on the relationship between the retransmission consent provisions in Section 325 and its impact on the composition of the basic tier.[8]

The Commission suggests that stations carried voluntarily by cable companies, after fulfilling their must-carry requirements, need not be carried on the basic service tier.[9] This analysis is

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[7] House Report at 79.

[8] In the must-carry proceeding, INTV, noted that the rights granted by the must-carry and channel positioning provisions of Section 614 take precedence over the channel positions that may be negotiated by stations pursuant to Section 325. See Comments of INTV in MM Docket No. 92-259 (January 4, 1992).

[9] Notice at para 11.

simply incorrect. Section 623(b)(7)(A) requires specific program services to be included in the basic tier. Subsection (iii) is quite specific:

> Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

All television stations, whether retransmission consent stations or must-carry stations must be included in the basic tier. For those cable systems that have fulfilled their signal carriage requirements, any additional television signals must be carried on the basic tier. The only exception to this rule is the carriage of broadcast stations that are delivered by satellite carriers, *i.e.* superstations. Cable operators have the discretion to place superstations on the basic service tier.[10] Also, the Commission is correct that a cable operator may add additional cable programming services to the basic tier, provided they are subject to the basic rate regulation provisions.[11]

II. STANDARDS FOR DETERMINING EFFECTIVE COMPETITION

The Cable Act requires the regulation of rates in the absence of effective competition. One of the tests used to determine

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[10]The Conference Report amended H.R. 4850 in this respect. Under the House bill, cable operators were required to carry superstations on the basic tier. The Conference Report specifically "allows cable operators the discretion to decide whether to carry superstations as part of the basic tier of service." Conference Report at 64.

[11]INTV agrees with the Commission that Congress intended the existence of only one tier of basic service.

whether effective competition exists is the presence of other multi-channel competitors in the market. This test is met if the franchise area is: 1) served by at least two unaffiliated multichannel video program distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area, and 2) the number of households subscribing to programming services offered by a multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.

The Notice seeks comment on what type of service would qualify as "a multichannel video programming distributor."[12] Specifically the Notice, in footnote 15, suggests that programmers offering compressed multichannel service on a cable system's leased access or government PEG channel may be considered a multichannel video programmer under this section. This statutory construction is rather strained.

As the Commission acknowledges, to consider such program services as multichannel distributors, the FCC would have to conclude that the statute did not require cable subscribers to purchase the basic tier in order to purchase *a la carte* offerings on PEG and leased access channels. As noted above, this is an incorrect interpretation of the statute.

The Commission's proposal is especially bizarre with respect to third party services on PEG channels. Section 623(b)7(A)(ii)

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[12]Notice at para 9.

states that any public, educational and government access programming must be included in the basic service tier. How can these services, which appear on PEG channels, be considered independent multichannel distributors while at the same time be included in a cable system's basic service tier? The Commission's interpretation makes no sense.

The effective competition test requires at least two unaffiliated multichannel video program distributors. Obviously, any program provider using a cable operator's leased access or PEG channels has some form of affiliation with the cable operator. Moreover the statute requires two unaffiliated distributors. It is plain that the statute is not referring to two programming services over a single distribution system. Indeed, the statute draws a distinction between multichannel distributors and programming. The FCC's interpretation attempts to merge the concepts, defining a program service as a multichannel distributor. Furthermore, the third test requires that the "number of households subscribing to programming services offered by a multichannel video programming distributor other than the largest multichannel video programming distributor exceeds 15 percent of the household in the franchise area." The term "other" obviously refers to a separate distribution system.

Finally, the statute requires that the two multichannel video distribution systems offer "comparable" services. While the statute does not specify that both systems must provide the exact same programming services, reasonableness dictates that similar

services should be offered. In this regard, the multiplexing of a single broadcast station is not a comparable service. NAB is correct that a station offering only a handful of channels will not provide effective competition to a 54 or 80 channel cable system.[13]

Congress contemplated two separate distribution systems offering comparable programming.[14] The Notice's attempt to sidestep this requirement provides further evidence that its interpretation of the statute is strained. To the extent the Commission's analysis is linked to its conclusion that the basic service tier is not a mandatory purchase, its inaccurate interpretation of a multichannel competitor taints its conclusion regarding the mandatory purchase of the basic tier.

III. RETRANSMISSION CONSENT

The Commission solicited comment on the treatment of retransmission consent payments. In doing so FCC noted that the 1992 Cable Act requires the Commission to consider the impact of retransmission consent payments on cable rates.[15]

INTV believes that retransmission consent payments should be included as one of the "direct" costs of providing the signal. In this regard, the costs of retransmission consent would be treated

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[13]NAB Comments at 13.

[14]On this point the conference agreement adopted the House provision. Conference Report at 62. The House Report characterized the provision as requiring two sources of multichannel video programming. House Report at 89.

[15]Notice at para 30 n. 60

the same as any other cable programming costs. There is nothing in the statute or legislative history mandating separate treatment for retransmission consent payments. The statutory obligation to consider the impact of retransmission payments on cable rates is satisfied by the FCC's overall rate regulation proposal which is designed to ensure "reasonable rates" for the basic service tier.[16]

IV. RATE REGULATION

The Commission has a daunting task in developing a regulatory structure that will insure "reasonable" rates for the basic tier of service. Both the statute and the voluminous legislative history demonstrate that perpetuation of the *status quo* is unacceptable.

INTV has no silver bullet proposal for the Commission. Nevertheless, NAB's proposal to combine cost based benchmarking

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[16]If the Commission decides to employ a benchmark system of regulation, there is a question as to how television station programming will be evaluated. INTV does not believe that retransmission consent payments should automatically be classified as an increased cost. For years cable operators have been taking broadcast signals without compensating television stations for the value of those signals. As Congress observed, this amounted to a tremendous subsidy to cable operators. See Senate Report at 35. Yet, the subsidy has never been reflected as a discount in cable rates. On the contrary, cable has been able to extract monopoly rents from consumers. In effect, cable has already been charging consumers for the value of broadcast television programming without compensating the television stations. Accordingly, when calculating the benchmark, the Commission must discount the value of the television subsidy before treating retransmission consent payments as an increased cost.

for replacement capital costs and individualized assessment for non-capital costs is worthy of serious consideration.[17]

INTV believes that whatever rate standard is adopted, the FCC is obligated by the statute to eliminate the "monopoly" rents currently enjoyed by the cable industry. As the DOJ recently found, nearly 45-50 percent of the rate increases since deregulation are due to cable's market power.[18] The ultimate goal is to enact a regulatory regime that best approximates competitive pricing in local markets.

As a matter of policy, comparing overall cable rates nationwide to the Consumer Price Index remains an important analytical base for establishing national cable policy. However, when creating adjustments to rate benchmarks for specific, local cable systems, a more localized standard appears to be superior. The Commission states that a Local Service Price Index (LSPI) would be more appropriate for adjusting cable rate benchmarks.[19] To this end the FCC has listed numerous pricing categories that would make up the LSPI. This approach appears reasonable and has support in the comments.[20]

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[17]NAB Comments at 13.

[18]Robert Rubinovitz, Economic Analysis Group, Antitrust Division, U.S. Department of Justice, "Market Power and Price Increases for Basic Cable Service Since Deregulation," August 6, 1991.

[19]Notice at para 38.

[20]Comments of Policy Communications Inc., January 26, 1993.

One concern is that a cable company would use the LSPI to game cable rate adjustments. This is a real concern. However, any adjustment standard, be it local or national, can be manipulated. Nevertheless, the FCC could require local franchising authorities to contract with companies regarding the preparation of the LSPI.[21] This would prevent the index from being abused.

V. CONCLUSION

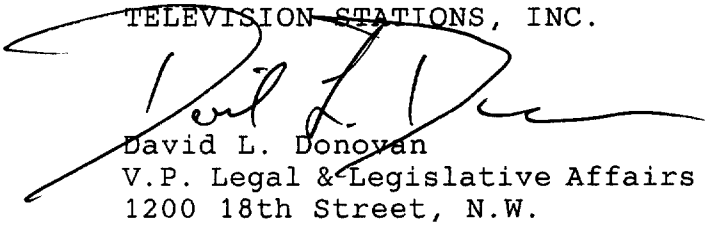
The FCC's tentative interpretation, regarding the ability of a cable system to offer *a la carte* services without requiring purchase of the basic tier, is fundamentally flawed. Neither the language of the statute nor the legislative history supports the Commission's position. Also, with the exception of satellite delivered superstations, all television stations must be included on the basic service tier. Considering program services on leased access and PEG channels as unaffiliated multichannel distributors is simply incorrect. As for rate regulation, the Commission must discount the subsidy that has been provided by local television stations before classifying retransmission consent payments as an increased cost. Finally, whatever rate regulation plan is adopted

[21] Id. at 7.

the FCC must ensure that cable rates for the basic tier will be reasonable and that cable systems will not longer extract monopoly rents from subscribers.

Respectfully submitted,

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.



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